

**Orkin Exterminating Co., Inc. and Tony G. Allen.**  
Case 10-CA-17560

30 April 1984

**DECISION AND ORDER**

**BY MEMBERS ZIMMERMAN, HUNTER, AND  
DENNIS**

On 17 March 1983 Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

Contrary to the judge, our dissenting colleague would dismiss the instant complaint because, in his opinion, Supervisor Tony Allen was not unlawfully constructively discharged, but instead quit his employment "prematurely." A reading of the credited testimony reveals our colleague to be in error in his conclusion.

Allen told Branch Manager Joe Jones he (Allen) had spoken with the National Labor Relations Board, and that he wanted to testify on behalf of an employee who had previously been discharged by the Respondent. Shortly thereafter, Jones told Allen that he had spoken "to his people," and "the word . . . is that management will not testify, and you will not testify for anybody as long as you're employed by [the Respondent]." As incisively noted by the judge, Jones had previously told Allen that the employee Allen would testify for had been discharged for union activity, and also that Jones hated unions.<sup>3</sup> In these circumstances, we think that any reasonable person hearing the words spoken by Jones would logically believe that his tenure would be terminated if he chose to give testimony to the Board. As did the judge, we conclude that Jones gave an ultimatum to Allen

that Allen could not testify to the Board if he remained employed by the Respondent.<sup>4</sup> When Allen decided that he would testify to this Agency, the Respondent left Allen no choice but to resign. Accordingly, we find in agreement with the judge that the Respondent constructively discharged Allen in violation of the Act.<sup>5</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Orkin Exterminating Co., Inc., Gainesville, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, or coercing nonsupervisory employees in the exercise of their statutory rights by discharging supervisory personnel for giving testimony before the National Labor Relations Board, or for expressing their intention to do so."

2. Substitute the attached notice for that of the administrative law judge.

**MEMBER HUNTER, dissenting.**

Assuming, arguendo, that a constructive discharge of a supervisor under circumstances similar to those of the instant case might properly be found violative of the National Labor Relations Act, I would not find that the Respondent constructively discharged its supervisor Tony Allen in violation of the Act. Rather, I conclude that Allen's resignation cannot be attributed to any unlawful action by the Respondent, and thus that Allen's resignation was a voluntary, albeit premature, act which was not a constructive discharge.

The Respondent indicated to Allen that it did not want any members of its management to testify to the National Labor Relations Board. Instead of testifying to the Board, or further challenging the Respondent about its intentions, Allen chose abruptly to resign. It is evident that the Respondent did not change the content of Allen's job nor

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We have modified the judge's recommended Order so that it conforms to the violation found herein. We have also modified the notice to conform to the Order.

<sup>3</sup> Jones also had earlier indicated to Allen that Allen's credibility as a sales manager had been ruined, and that he would probably be "hurt down the road" because of his union activities.

<sup>4</sup> Cf. *Martin Arsham Sewing Co.*, 244 NLRB 918 (1979).

<sup>5</sup> Inasmuch as the Respondent's conduct independently violated Sec. 8(a)(1) of the Act, we find it unnecessary to consider whether the Respondent's conduct also violated Sec. 8(a)(4). See *Better Monkey Grip Co.*, 115 NLRB 1170 (1956), enf'd. 243 F.2d 836 (5th Cir. 1957); *Oil City Brass Works*, 147 NLRB 627 (1964), enf'd. 357 F.2d 466 (5th Cir. 1966); *H. H. Robertson Co.*, 263 NLRB 1344 (1982). In agreeing with the judge's conclusions, we find it unnecessary to rely on his comment that, even if Allen did not mention precisely that he intended to testify before the Board, such knowledge could be imputed to the Respondent. We also do not rely on his further implication that, even if Jones' testimony were credited, there might be a violation of the Act.

Member Dennis concurs in the finding of a violation based on the particular facts presented here.

did it inflict physical or emotional distress on him. Indeed, the Respondent took no affirmative action to deprive Allen of any rights that he may have previously enjoyed. Allen was therefore never placed in any jeopardy of job loss or threatened with more onerous working conditions by the Respondent. Thus, there were no immediate threats which justified Allen's precipitous response to the Respondent's admonition. Rather, he simply resigned prematurely in anticipation that something *might* happen to him. I find that such a resignation does not amount to a constructive discharge and, accordingly, I would dismiss the complaint alleging that the Respondent constructively discharged him.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce nonsupervisory employees in the exercise of their statutory rights by discharging supervisory personnel for testifying before the National Labor Relations Board, or for expressing their intention to do so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate Tony G. Allen to his former position at the time of his discharge, or to a substantially equivalent position if his former position no longer exists, and WE WILL remove from his personnel records all reference to his discharge and send him a notice in writing thereof that this termination will not be used against him in any way.

WE WILL make whole Tony G. Allen for any loss of earnings or other benefits sustained by him

by reason of our discharge of him with interest on moneys due.

## ORKIN EXTERMINATING CO., INC.

### DECISION

#### STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on August 18 and September 24, 1982, at Gainesville, Georgia, pursuant to a complaint issued by the Acting Regional Director on December 2, 1981, and is based on a charge filed on October 21, 1981, by Tony G. Allen, an individual. This case had previously been consolidated with Case 10-CA-17523. However, pursuant to a settlement agreement, I granted a motion to sever Case 10-CA-17523 from Case 10-CA-17560 at the hearing on August 18, 1982. The remaining complaint in Case 10-CA-17560 alleges that Orkin Exterminating Co., Inc. (the Respondent) constructively discharged Tony G. Allen, a supervisor, "because of his intention to seek the assistance of the National Labor Relations Board," and thereby violated Section 8(a)(4) and (1) of the National Labor Relations Act (the Act). The Respondent, by its answer filed on December 7, 1981, has denied having violated the Act.

On the entire record in this case, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT AND ANALYSIS<sup>1</sup>

##### I. JURISDICTION

###### A. *The Business of the Respondent*

The complaint alleges, the Respondent admitted in its answer, and I find that "the Respondent is, and has been at all times material herein, a Georgia corporation with an office and place of business located at Gainesville, Georgia, where it is engaged in providing pest and termite control services to residential and commercial customers," that the "Respondent, during the past calendar year [prior to the filing of the complaint], which period is representative of all times material herein, purchased and received at its Gainesville, Georgia, facility material and supplies valued in excess of \$50,000 directly from suppliers located outside the State of Georgia," and that the Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

###### B. *The Labor Organization*

It was stipulated by the parties at the hearing and I find that the Georgia State Council of Carpenters (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> The following includes a composite of the testimony of the witnesses, which testimony is credited except as specific credibility resolutions are hereinafter made.

## II. THE ALLEGED UNFAIR LABOR PRACTICE

In September 1981, an organization campaign was commenced by the Union among the Respondent's employees. Tony G. Allen, the Charging Party herein, was then employed as a sales manager by the Respondent at its Gainesville branch office. He had been initially employed by the Respondent in August 1976 as a sales manager. Allen had the responsibility for working with salesmen and training new salesmen.<sup>2</sup> Allen testified that he became aware of the Union's campaign in September 1981, and that he signed a union authorization card and attended a union meeting which was attended by certain of the Respondent's salesmen (all but one of the salesmen who reported to Allen), including salesman Charles Bowen and union representative Jones (Ernest Joseph Jones).<sup>3</sup>

Allen testified he attended a meeting about 5 p.m. with Branch Manager Jones and District Manager Berlin at which Berlin announced to Allen that salesman Charles Bowen would be discharged. When Allen inquired as to the reason for Bowen's discharge, Berlin referred to an incident a month prior thereto at which Regional Vice President Wilson had attended a sales meeting and had directed an inquiry to Bowen to which Bowen had retorted with a vulgar remark, and said that Bowen was to be terminated for this reason as it was feared Bowen would act similarly with customers. Allen protested that he had worked with Bowen "on many occasions" and that Bowen had never been involved in any difficulties with customers. Berlin said Allen "couldn't sell him on keeping Charles [Bowen] on board." Allen was then instructed by Berlin and Jones to call Bowen into the office, and Bowen was then terminated by Berlin.<sup>4</sup>

Allen testified further that on the same day following Bowen's discharge he was present during a conversation between Joe Gable (the Respondent's service manager) and Branch Manager Jones wherein Gable inquired of Jones, "What about the rest of those cards?" and Jones replied, "What cards?" Gable then said, "The Union authorization cards that Charles [Bowen] had said 70 or 80 percent of the people had signed." Allen testified Jones then replied, "I don't know what they're going to do about it yet," and then asked Allen, "If I knew anything about the Union," to which Allen replied, "No." Allen testified Jones then pulled out of his pocket a "piece of literature of the things that an employer can't do to discriminate against employees for engaging in union activities," and Jones then said, "This is the reason Charles [Bowen] was fired, is because he was trying to organize a Union." Allen testified he then told Jones that he (Allen) had signed a union card and Jones told him that he (Jones) could not talk to Allen "about it anymore."

<sup>2</sup> The parties stipulated at the hearing and I find that Allen, the Respondent's Gainesville branch manager Joe Jones, and the Respondent's north Georgia district manager John Berlin were all supervisors as defined in Sec. 2(11) of the Act.

<sup>3</sup> Union representative Jones testified at the hearing as did Branch Manager Jones. Union representative Jones was employed as an organizer for the Union and conducted the Union's campaign to organize the Respondent's employees.

<sup>4</sup> Bowen was discharged on October 6, 1981.

Allen testified the following day he was told by Branch Manager Jones that he could not straddle the fence concerning the Union, that his credibility as a sales manager had probably been ruined, and that "[i]t would probably hurt me down the road." He testified that Jones also told him he hated unions, and he (Jones) was going to eliminate the "gas bonus program."

Allen testified that the following day he telephoned union representative Jones from his home and repeated what Branch Manager Jones had told him, and that union representative Jones warned him to be careful as he was not certain whether Allen would be protected under the law. Union representative Jones recommended Allen call the National Labor Relations Board. Allen testified that he called the Board and talked with a lady, and that he told her of the circumstances of the discharge of Bowen and that "I wanted to voluntarily come out and testify on behalf of Charles Bowen and the National Labor Relations Board."

Allen testified further that the next morning he met with Branch Manager Jones in the Gainesville office and told Jones that he had talked with representatives of the National Labor Relations Board and that he wanted to testify on behalf of Bowen, and Jones replied he did not know "whether I could testify to the National Labor Relations Board." Allen testified Jones questioned him "about the union authorization cards, where they came from, how were they to be returned, if I had signed one, and I told him no again; and he wanted to know if Jim Hames was involved and I told him I really didn't know." Allen testified Jones also "said they had made an example of Charles Bowen by his firing because of the union activities." Allen then left to go to Lanier Petroleum to buy gas and, when he arrived, there was a telephone call waiting for him from Branch Manager Jones, who told him to wait there as he needed to talk to Allen. When Jones arrived, he told Allen, "He had talked to his people, and the word from his people is that management will not testify, and you will not testify for anybody as long as you're employed by Orkin." Allen asked the reason for this and Jones told him, "That's all he knew to tell me." Allen started to leave in his automobile, but then returned to the service station and told Jones "[t]hat he could tell his people that I would testify to the National Labor Relations Board, and that I was resigning my position if they wouldn't allow me to testify." Two days later, Allen returned to the Respondent's premises and saw Berlin and Branch Manager Jones and asked to be returned to work, but Jones refused to do so and said there was "no way" that Allen would be reemployed.

The Respondent's counsel questioned Allen on cross-examination. Allen was unable to identify the lady he had spoken with at the National Labor Relations Board or to place the time of day when he placed the telephone call. Allen had obtained the Board office telephone number from union representative Jones.

Union representative Jones testified he initiated the Union's campaign among the Respondent's employees in September 1981. Jones testified he was informed by Allen that Allen intended to testify on behalf of Bowen,

and he (Jones) told Allen that he (Jones) could offer Allen no protection and that Allen "would have to contact the Board to see what protection was available to him." Jones testified he gave Allen the number of a board agent with whom he (Jones) had previously discussed another matter involving the Union's campaign.

Bowen testified that he and eight other employees were involved in the union organization campaign among the Respondent's employees and corroborated Allen's testimony concerning what occurred at the meeting attended by Branch Manager Jones, Allen, and Bowen at which he (Bowen) was terminated by Berlin assertedly for comments he had made in a previous meeting on September 1, 1981, to the Respondent's vice president. Bowen testified he met the following day with Jones (union representative) at Allen's home and discussed the filing of a charge with the Board.

The Respondent called Branch Manager Joe W. Jones as a witness on its behalf. Jones testified that he initially became aware of the union campaign on October 5 or 6 1981, when he was informed of the union campaign by District Manager Berlin. Jones testified he was involved in a conversation with Service Manager Joe Gable and Allen on the day following the Respondent's termination of Bowen, and that in this conversation Gable told him (Jones) that Bowen had made a statement to Gable in the presence of Allen and told Gable that he was the only employee who had not signed a union card. Jones testified he "turned then and looked directly at Tony [Allen]," but did not say anything to Allen at that time. Jones testified Allen "nervously rocked back and forth and said 'yeah, I knew about it.'" Jones told Allen, "Tony, you're in management, and then Tony said I can get it stopped." Jones acknowledged having seen the union pamphlet entitled "35 Things Your Employer Cannot Do" (G.C. Exh. 2), which he testified he had been shown by the Respondent's Athens, Georgia branch manager "on the morning of the sixth [October]." Jones testified Allen had "quit" on October 9, 1981, by announcing his resignation to Jones on the parking lot of Lanier Petroleum. Jones acknowledged that a meeting had taken place between himself and Allen earlier that morning at Allen's request at which "Tony told me that he was contacted by the Union, and they had asked him to make a statement." After this conversation, Jones (branch manager) "immediately called my district manager [John Berlin]," and told Berlin "[t]hat Tony had talked to me and advised me of that and also Tony had told me that he would not make a statement." Berlin told Jones "he'd get back with me," and did so within 5 minutes and asked Jones "[i]f I would get in touch with him [Allen] as soon as possible and tell him that he is in management, and management don't make statements to unions." Jones then called the service station and requested that Allen wait until he (Jones) arrived. Jones arrived at the service station and told Allen that Berlin had advised him to tell Allen "that management does not make statements to unions." Jones testified Allen asked the reason for this and he (Jones) replied "that's all I was told to tell you and that's all I would say." Allen then left but returned to the service station shortly thereafter, and told Jones, "I'm going to the office and turn my

stuff in and I will make a statement." Jones then "went on to town to run some errands," and when he returned to the Respondent's office Allen had taken "his stuff out of the company car and was waiting for his wife to pick him up." Jones contended that Allen had not made any reference to the National Labor Relations Board in either of the two conversations on October 9. He also denied he was aware of the existence of any charge having been filed against the Respondent with the Board on October 9. Jones denied having told Allen that he (Allen) would be terminated if he gave a statement to the Union, having told Allen that Bowen had been terminated for engaging in union activities, or having made a statement to Allen about eliminating the salesmen's gas bonus. On cross-examination, Jones denied having told Allen that he hated unions, or that Allen had ruined his credibility as a sales manager as a result of his involvement with the Union.

#### Analysis

The General Counsel contends in his brief that Allen was given a Hobson's choice of not testifying on behalf of Bowen before the National Labor Relations Board or being terminated, and that Allen then resigned in order to testify before the Board concerning Bowen's termination, and the resignation, accordingly, constituted a constructive discharge of Allen by the Respondent because of his intention to give testimony to an agent of the National Labor Relations Board. The Respondent contends that Allen's resignation was voluntary and did not result from threats or "intolerable pressure" by the Respondent, and further contends that Allen's statements to company officials indicated that he intended to give a statement to the Union not the Board, and thus, even if the resignation were found to be a constructive discharge, no violation could be found since Section 8(a)(4) does not require an employer to permit its supervisors to assist labor organizations.

I have reviewed the testimony of Allen and Branch Manager Jones concerning the circumstances leading up to and culminating in Allen's resignation on October 9, 1981. I credit Allen's version of the conversation between Service Manager Gable and Branch Manager Jones wherein, Allen testified, Jones stated that Bowen had been discharged for attempting to organize a union. I further credit Allen's version of the meeting between Branch Manager Jones and Allen the following day wherein Jones told him that he could not straddle the fence concerning the Union, and that his credibility had probably been ruined as a sales manager and it (his union activities) would probably hurt him down the road. I further credit Allen's testimony that Jones told him that he hated unions, and that he (Jones) was going to eliminate the gas bonus program. I also credit Allen's version of the events of October 9 rather than the version of Branch Manager Jones. Initially, I credit Allen that he told Branch Manager Jones that he would testify concerning the termination of Bowen rather than that he would give a statement to the Union as testified to by Branch Manager Jones.

Initially, Jones did not deny that these conversations took place, but rather his testimony tendered to downplay, and in part deny, statements attributed to him by Allen in these conversations. Thus, he denied he told Allen that Bowen was discharged because of his union activity or that he (Jones) hated unions. He also testified Allen told him he was going to give a statement to the Union. If Jones' version as to what he said to Allen concerning Bowen's discharge were to be credited, there appears to have been little of substance about which Allen would have been able to give a statement to the Union concerning Bowen's discharge. If on the morning of October 9 Allen had told Jones (as Jones contends) that he (Allen) had decided not to give a statement to the Union, I find it unlikely that Jones would have called Berlin immediately to inform him that Allen had decided not to testify, and that he (Jones) would have (after talking to Berlin) urgently called the service station to detain Allen until Jones arrived in order to tell Allen that management representatives do not give statements to unions.

I also credit Allen's version that he informed Jones he would testify before the NLRB concerning the discharge of Bowen rather than Jones' version that Allen informed him only that he had been contacted by the Union and would not give a statement to the Union. There was no collective-bargaining agreement in existence and thus no established grievance procedure. It is apparent that the discharge of Bowen for allegedly engaging in union activities would be a matter for consideration by the National Labor Relations Board. I further credit the testimony of union representative Jones, who testified that he gave Allen the name of a Board agent to discuss whether he (Allen) would be protected in the event he testified. This testimony is consistent with Allen's testimony that he apprised Branch Manager Jones that he intended to testify before the Board as opposed to Branch Manager Jones' version that Allen had only mentioned having been contacted by the Union to give a statement. I do not find Allen's inability to place the date of his conversation with the Board agent to require that his testimony that he did so be discredited. Further, I do not find Allen's affidavit inconsistent with his references to giving testimony to the Board in his October 9 meetings with Jones. The affidavit refers to giving testimony (R. Exh. 1). I find that knowledge that Allen intended to testify before the National Labor Relations Board can be inferred to the Respondent from the credited testimony of Allen, even assuming that Allen specifically had not utilized the phraseology "testify to the National Labor Relations Board" in his conversation with Branch Manager Jones. I find, as contended by the Respondent, that Allen embellished his testimony on cross-examination when he testified concerning his conversation with Branch Manager Jones at the service station that Jones had informed him "and if I wanted to testify, I could just virtually look for me something else to do." However, Allen immediately conceded when questioned by the Respondent's counsel that Jones had not used those exact words but rather had told Allen that neither Allen nor "any other supervisor would testify as long as they were employed with Orkin Exterminating." My review of Allen's testimony convinces me that this embellishment was one

of emphasis and phraseology as to the import of Jones' statement rather than a specific misrepresentation of the truth, and I do not find this embellishment by Allen in his testimony to require that his testimony be rejected in this proceeding.

Section 8(a)(4) of the Act provides that it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." As the General Counsel contends in his brief, the Board held in *General Services*, 229 NLRB 940 (1977), enf. denied 575 F.2d 298 (5th Cir. 1978), that the protection of Section 8(a)(4) is not limited to employees but also includes supervisors.<sup>5</sup> The Board stated in *General Services* at 941:

In sum, the Board and the courts have recognized that if the Board is to perform its statutory function of remedying unfair labor practices its procedures must be kept open to individuals who wish to initiate unfair labor practice proceedings, and protection must be accorded to individuals who participate in such proceedings.

The Board further cited *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972):

The approach to § 8(a)(4) generally has been a liberal one in order fully to effectuate the section's remedial purpose.

See also *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980), enf. denied 660 F.2d 910 (3d Cir. 1981), also cited by the General Counsel, wherein the Board held (concerning a supervisor and his bonus dispute) at footnote 2 that "an employer must refrain from discriminating against an individual for indicating an intent to go to the Board since it is the Board's function, and not the employer's, to decide whether the individual is covered by the Act and his claim has merit."

I find that, under the circumstances of this case, the ultimatum given to Allen by Jones at the service station on October 9, 1981, was clear. He could not testify and remain employed by the Respondent. In the face of the discharge of Bowen on October 6, 1981 (3 days prior thereto), and the statements by Branch Manager Jones to Allen that Bowen had been discharged for engaging in union activities, as well as Jones' dislike of unions and his hurried discussion with District Manager Berlin followed by his immediate followup encounter with Allen at the service station, it is clear that the ultimatum given to Allen was that, if he testified concerning the discharge of Bowen, he would be discharged. Under these circumstances, I find that the choice was manifestly clear to Allen and constituted a threat to Allen that if he testified he would be discharged. See *Daniel Construction Co.*, 244 NLRB 704 fn. 2 (1979). It is also noteworthy that Jones made no attempt to dissuade Allen from resigning nor did he inquire as to the reason for Allen's resignation. Accordingly, I find that Allen was constructively discharged by the Respondent because of his expressed in-

<sup>5</sup> Citing *General Nutrition Center*, 221 NLRB 850 (1975).

tention to testify before the National Labor Relations Board concerning the discharge of Bowen, and that the Respondent thereby violated Section 8(a)(4) and (1) of the Act. *General Services*, supra; *General Nutrition Center*, supra; and *Hi-Craft Clothing Co.*, supra. Moreover, assuming Jones' version of the meetings between himself and Allen on October 9, 1981 (that Allen had discussed giving a statement to the Union), were to be credited, compare *Greenbrier Valley Hospital*, 265 NLRB 1056 (1982), wherein the Board stated at 1057:

Recently, in *Parker-Robb Chevrolet, Inc.*,<sup>6</sup> the Board rearticulated certain circumstances in which the discharge of a supervisor may violate the Act, including, e.g., giving testimony adverse to an employer's interest, either at an NLRB proceeding, or during the processing of an employee's grievance under a collective-bargaining agreement; or refusing to commit unfair labor practices. In such circumstances, the protection afforded supervisors stems not from any statutory protection afforded supervisors, but rather from the need to vindicate the exercise by *statutory employees* of their Section 7 rights.

I find that the General Counsel has established by the preponderance of the evidence a prima facie case that Allen was constructively discharged by the Respondent because of his announced intention to give testimony before the National Labor Relations Board. I find that the Respondent has failed to rebut this prima facie case. Accordingly, I find that the Respondent violated Section 8(a)(4) and (1) of the Act by its constructive discharge of Allen on October 9, 1981.

### III. THE EFFECT OF THE UNFAIR LABOR PRACTICE

The unfair labor practice of the Respondent as found in section II in connection with the Respondent's operations as found in section I has a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tends to lead to disputes burdening and obstructing the flow of commerce.

### CONCLUSIONS OF LAW

1. The Respondent, Orkin Exterminating Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Georgia State Council of Carpenters is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has established a prima facie case of a violation of Section 8(a)(4) and (1) of the Act by the discharge of Tony G. Allen because of his intention to testify before the National Labor Relations Board. The Respondent has failed to rebut the prima facie case, and I find that the Respondent violated Section 8(a)(4) and (1) of the Act by its discharge of Tony G. Allen.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

### THE REMEDY

Having found that the Respondent violated Section 8(a)(4) and (1) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative action deemed necessary to effectuate the purposes and policies of the Act, including the posting of the appropriate notice.

Having found that the Respondent discharged Tony G. Allen in violation of Section 8(a)(4) and (1) of the Act, it shall be recommended that the Respondent offer him immediate reinstatement and make him whole for any loss of earnings and benefits he may have sustained by reason of the unlawful discharge. It is also recommended that the Respondent expunge from its files any reference to the discharge of Allen and notify him in writing thereof. All loss of earnings and benefits incurred by Allen as a result of the Respondent's acts, as set out above, shall be computed with interest in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>7</sup>

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

### ORDER

The Respondent, Orkin Exterminating Co., Inc., Gainesville, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees for giving testimony before the National Labor Relations Board or for expressing their intention to do so.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act.

(a) Offer Tony G. Allen immediate and full reinstatement to his former position at the time of his discharge or, if this position no longer exists, to a substantially equivalent position, without prejudice to any rights or privileges previously enjoyed.

(b) Expunge from its files any reference to the termination of Tony G. Allen and notify him in writing of this and that his termination will not be used as a basis for future personnel actions concerning him.

(c) Make Tony G. Allen whole for any loss of earnings or other benefits he may have sustained by reason of the discrimination against him in the manner set forth in the section of this decision entitled "The Remedy."

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records nec-

<sup>7</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>6</sup> 262 NLRB 402 (1982).

essary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Sign and post copies of the attached notice marked "Appendix,"<sup>9</sup> immediately on receipt in conspicuous

---

<sup>9</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places at its facilities in Gainesville, Georgia, to which its employees report. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed with respect to all allegations of violations not specifically found herein.